MULTIPLE CAUSES OF LOSS AND CLAIMS FOR CONTRIBUTION

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In Marlborough District Council v Altimarloch Joint Venture Ltd[1] *the New Zealand Supreme Court dealt with a number of inter-related questions. These were: whether a council owed a duty of care to purchasers of land in issuing a Land Information Memorandum which misstated the water rights associated with the land; whether damages payable by the vendors, for similarly misrepresenting the water rights, should be based on the difference between the value of the land contracted for and the value obtained or on the cost of providing the represented quantity of water; whether the council could be seen to have caused the purchasers to suffer loss in circumstances where the purchasers retained the ability to claim damages for misrepresentation under the contract with the vendors; and whether the vendors could obtain an order for contribution in equity from the council. The article examines and evaluates the differing views expressed by the members of the Court about each of these issues. In the result the vendors' claim for contribution was rejected, which decision has left the law in an unsatisfactory state. Basing the right to claim contribution on the question whether enforcement by a plaintiff against person A discharges, in whole or part, any obligation to pay the plaintiff owed by person B would resolve the problem.*

1. *Introduction*

Where two or more tortfeasors cause the same damage to the one plaintiff, a long-established rule of the common law allows the victim to sue all or any of the tortfeasors and obtain judgment against each for the full amount of the loss.[2] The tortfeasors' liability is said to be in solidum. Of course, the plaintiff cannot actually recover damages for more than his or her whole loss: full satisfaction of the plaintiff's claim always bars further proceedings.[3] The common law rule means that the plaintiff need not prove exactly how large a part each defendant played in causing the damage; and he or she is not prejudiced if not all of the possible defendants can be found, or are solvent, or are insured. By s 17(1)(c) of the Law Reform Act 1936, a tortfeasor who is sued or who settles can seek to recover a contribution from any other tortfeasor who is liable in respect of the same damage. However, the risk of non-satisfaction lies with the person claiming contribution, not the plaintiff.

These principles may well operate reasonably satisfactorily in circumstances where the possible defendants are all tortfeasors and it is clear that they all cause the same loss. But complications arise where the defendants are or may be liable on some basis other than in tort and/or where the damage they have caused to the plaintiff is not or may not be the same. The decision of

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1 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

2 *Coleman v Harvey* [1989] 1 NZLR 723 (CA).

3 *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA) at 587, 589.

the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd*[4] provides a good illustration of these complications and of the legal difficulties they create.

The purchasers of a farm were misled about the farm's water permits by the vendors' real estate agents, who referred to permits that were no longer current; by the vendors' solicitors, who approved the agreement; and by the local council in its provision of wrong information about the permits in the Land Information Memorandum (the LIM). In fact, resource consents had been granted to extract only half of the promised amount of water. The purchasers issued proceedings seeking damages from the vendors and from the Council. The damages claimed were for the cost of obtaining additional water and for the cost of building a dam to store water for the future. The Council denied that it owed the purchasers any duty of care or that it had caused them loss, and also resisted a claim by the vendors for contribution. The vendors argued that they should be liable only for the difference between the value of the land with the water rights as represented and its value with the rights as actually granted, and not for the full cost of providing the promised water. In the High Court it was held that the purchasers could recover from the vendors the full cost of providing the water and that the Council also caused loss and should contribute a share of the damages payable by the vendors. Appeals by the vendors' agents and the Council to the Court of Appeal were dismissed (save as to the quantum of damages payable by the Council).[5] The defendants appealed further to the Supreme Court, which allowed the Council's appeal on grounds to be explained below.

The various issues that are raised by the facts and claims are inter-related. We will look first at the different bases for the imposition of liability – on the vendors and their agents (for failure to provide the agreed water rights) and on the Council (for a misstatement inducing entry into the contract to buy the land). Secondly, we must consider the measure of damages under each cause of action and the significance of the fact that the two measures differ. This leads, thirdly, to a consideration of the cause of the purchasers' loss. And finally, we arrive at our core concern, which is the question whether, in light of the Court's findings on the above issues, the basis for a claim for contribution by the vendors against the Council could be seen to exist.

2. *Liability of the vendors*

The liability of the vendors arose pursuant to the provisions of s 6 of the Contractual Remedies Act 1979. Section 6(1)(a) provides that if a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him or her by or on behalf of another party to that contract, he or she is entitled to damages from the other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken. At the same time, by s 6(1)(b), there can be no liability in damages for deceit or negligence. Thus, liability for pre-contractual

4 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

5 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879.

representations is treated as a contractual matter. Such liability is dependent not on proof of negligence but simply on meeting the terms of the statute.

There was no argument in *Altimarloch* before the Supreme Court about the vendors' liability under s 6. But the question as to the measure of damages payable by the vendors was much disputed, as will be discussed shortly.

3. *Liability of the Council*

The Court was unanimous in holding that the Council owed a duty of care to the purchasers in issuing the LIM. Tipping J observed that the relationship between the parties was closely analogous to a contractual one, the purchasers paying a fee for the LIM. It was plain from the legislation providing for the issue of LIMs[6] that Parliament recognised and emphasised that those obtaining LIMs from territorial authorities were entitled to rely on the accuracy of the information that was required under s 44A(2) to be included. The subsection was apt to encourage general reliance on the LIM's contents, and that was a significant indicator that, as a matter of policy, those relying on LIMs should not be denied the duty of care that proximity considerations suggested should exist. The precise purpose for which the LIM was sought did not need to be known by the Council and there was nothing in the statutory regime which suggested that the Council's liability in issuing a LIM should be confined to safety or other limited issues. So both proximity and policy considerations favoured the imposition of a duty of care on the local authority in the instant circumstances.[7]

Two brief comments are needed. First, there was no question of s 6 of the Contractual Remedies Act 1979 applying to the claim against the Council. Although the Council's misstatement was a contributory factor in inducing the purchasers to enter the contract of purchase, the Council of course was not a party to that contract. And it is clear that the negligence action remains available where the person being sued has induced the plaintiff to enter into a contract with someone else. So ordinary common law liability attaches to a misstatement by an agent inducing a contract between the representee and the principal,[8] or by anyone else inducing a contract between others.[9]

As regards the basis for the duty, this involved a fairly straightforward application of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[10] Tipping J refers, just a little mysteriously, to a "general reliance" on the LIM's contents, whereas *Hedley Byrne* claims require actual, specific, reliance on the words in

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6 Local Government Official Information and Meetings Act 1987, s 44A.

7 Compare *Saffioti v Auckland Council* [2012] NZHC 2394, where Woodhouse J declined to apply the *Altimarloch* reasoning to an allegation that a council had been negligent in failing to state in the LIM that a code compliance certificate had been issued by a building certifier rather than the council and that the certifier had been deregistered by the Building Industry Authority on the grounds of negligence and incompetence.

8 For example, *Wakelin v RH and EA Jackson Ltd* (1984) 2 NZCPR 195 (HC); *ME Torbett Ltd v Keirlor Motels Ltd* (1984) 1 NZBLC 102,079 (HC); *Tak & Co Inc v AEL Corp Ltd* (1995) 5 NZBLC 99,357 (HC).

9 *Edgeworth Construction Ltd v ND Lea & Assocs Ltd* [1993] 3 SCR 206 (SCC); but compare *RM Turton & Co Ltd v Kerslake & Partners* [2000] 3 NZLR 406 (CA).

10 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

question. No doubt Tipping J was not intending to introduce the uncertainties surrounding the concept of general reliance,[11] and was saying simply that purchasers were apt to rely on LIMs for all kinds of reasons and that this was contemplated by the relevant legislation. Certainly the relationship between the Council and the purchasers was close and proximate. Indeed, as his Honour recognised, the Council here supplied the service for a fee, which prompts us to wonder why the relationship was seen as closely analogous to contract but not, in fact, contractual.

4. *The measure of damages*

Although both vendors and Council could be liable, the measure of damages payable by the vendors was determined to be much greater than the measure payable by the Council. An explanation is found in the different measures payable in contract and in tort.

In claims in contract the plaintiff is entitled to be put into the position he or she would have been in if the contract had been performed. In other words, the plaintiff can seek to be compensated for the loss of the bargain. But this loss may be measured in different ways – by the difference in value between what was promised and what was supplied, or by the cost of curing the breach. In the instant case the evidence established that the difference between the market value of the property with the water rights as represented and its market value without those rights was $400,000. By contrast, the cost of curing the breach was $1,055,907, which was the cost of buying extra water rights and of building a dam to make up for the water shortfall. The Supreme Court decided by a majority of three to two that the purchasers were entitled to recover this higher amount from the vendors.

In claims in tort the damages seek to restore the plaintiff to the position he or she would have been in had the tort not been committed. Here the plaintiffs had acquired property worth $400,000 less than its market value with the promised water rights, but the contract price was $275,000 below that market value. So the plaintiffs' loss on a tort basis was $125,000 – the difference between what the plaintiffs had paid and the value of what they had got, which was the land with the limited water rights. This was the only measure available for the purchasers' claim against the Council.

Let us consider first the reasoning which led the Court to award full "cost of cure" damages against the vendors. Tipping J said that what damages were appropriate was a question of fact. There were no absolute rules and the key purpose when assessing damages was to reflect the extent of the loss actually and reasonably suffered by the plaintiff. This might be measured on a difference in value basis or on a performance basis, the damages representing the amount needed to enable the plaintiff to have the contract performed as fully as was reasonable and possible.

His Honour cited two modern cases of high persuasive authority as background. In *Ruxley Electronics and Construction Ltd v Forsyth*[12] the House

11 For a discussion of the concept, see *Stovin v Wise* [1996] AC 923 (HL) at 953–955; *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 (CA) at 1027–1028.

12 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 (HL).

of Lords held that it was not reasonable for an owner to insist on the rebuilding of a swimming pool which was not as deep as the contract required, because the pool was still perfectly suitable for diving and the cost would be out of proportion to the benefit that would be obtained. On the other hand, in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[13] the High Court of Australia held that a tenant who had covenanted with the landlord not to make any substantial alteration to the entrance lobby of the premises, and who then altered the lobby without the landlord's consent, was liable for the cost of restoring the premises to their former state, even though this was substantially more than the diminution in value of the premises. It was held to be reasonable for the landlord to insist on restoration, so the proper measure of damages was the cost of doing so.

In the instant case such limited extra water rights as were available had been purchased, but the evidence showed that only by building a dam could the purchasers be reasonably assured of having available the full quantity of water which the vendors had contracted to supply. There was no basis for contending that it would have been reasonable for the purchasers to have sold the land and endeavoured to have established their vineyard elsewhere. They did not find out about the problem until after the sale and purchase had been settled, when they were in the process of establishing their vines. If they had elected to settle with knowledge of the shortfall the position might have been different. The question of reasonableness should be assessed against the premise that parties enter into contracts with the expectation of performance, not with the expectation of compensation for breach. There was nothing to suggest that simply because the performance measure was substantially more than the compensation measure the former was an unreasonable response to the vendors' breach, nor that the performance measure was disproportionate to the benefit to be obtained.

Blanchard and McGrath JJ expressed similar views. But Elias CJ (Anderson J agreeing) thought differently. Her Honour maintained that the usual measure of damages for breach of contract was the difference between the value contracted for and the value obtained, but recognised that that measure might not always be appropriate. Here she considered that expectation losses were properly met by damages reflecting the loss in value of the bargain and that the authorities on cost of cure did not support use of that measure to secure "functional equivalence" of a representation the value of which was able to be measured in loss of value in the bargain. The contract was one for the purchase of land, in respect of which a market existed and value could be objectively assessed to reflect the breach of warranty. It was not a contract for building work, and the construction of a dam was not stipulated performance. The authorities concerning defective performance of contracts to supply services, construct buildings or keep premises in repair were not in point. The contractual stipulation was to transfer the agreed water rights to the purchasers on settlement. The purchasers' loss was that the property was worth less than it would have been had the representation been true, and such loss could be met in full by damages for the difference in value. Furthermore, even if cost of cure had been appropriate to achieve conformity with the contract, it was not

13 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.

reasonable because it was disproportionate to the benefit obtained. The price paid for the additional water rights was itself partial cost of cure, to which the additional cost of constructing the dam had been added. That total cost ($1.05m) was to be contrasted with the purchase price of the property ($2.675m) and its value without the water rights ($2.55m). The disparity was direct evidence against which to assess the reasonableness of this cost of cure. It was out of proportion to the increase in value of the property and was unreasonable.

Her Honour accepted that the reasonableness of a proposed measure of damages might not always be adequately assessed by a purely economic comparison. Where performance had been stipulated for, the parties might more readily be taken to expect that damages should enable the party to obtain performance. But this was not such a case. The cost of storage in a dam was a proxy for achieving "functional equivalence". It was not a case where the parties could reasonably have expected such a result, at any cost. Nor was it a case where difference in value damages was inadequate to meet the expectations of the parties. And it was not difficult to envisage that the construction of permanent storage capacity might have had advantages over water rights which were limited in duration (although generally renewed), and which might be subject to controls in times of shortage despite their priority over other water rights. Although it might have been accurate enough to characterise the lost expectation in terms of water, the contract was not for the supply of water but for the delivery of rights to water.[14]

Elias CJ's view very arguably is the more convincing.[15] The key point is that there was no contractual obligation to build the dam. Its cost was seen by the majority as equivalent to the grant of water rights, the full measure of the promised rights being impossible to obtain. But in the result the plaintiffs obtained damages representing a different, and more valuable, benefit than that which was promised.[16] A right to water is not at all the same thing as a lake with water already in it. Suppose due to a lack of rain there was not enough water available to satisfy the purchasers' full rights. The capacity to use stored water would or might be a critical advantage. Further, it does not appear that the plaintiffs were, or could be, under any kind of obligation to spend the money on the dam, although Tipping J did say that the plaintiff must have a

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14 For recent decisions at first instance declining full "cost of cure" damages, see *Kaori Ltd v Shrinkforce Shrink Wrap Services Ltd* [2012] NZHC 3204 (damages awarded based on cost of painting out cosmetic damage to luxury yacht rather than cost of full repaint); *Johnson v Auckland Council* [2013] NZHC 165 (damages for negligence by a council in approving defective work and issuing a code compliance certificate for a leaky home based on difference in value (and subject to a deduction for contributory negligence)).

15 Compare the views of M Roberts "Contractual Damages and the Supreme Court – *Altimarloch* and the Shifting Sands of Unreasonableness" (2013) 9 NZBLQ 11.

16 At common law a representation inducing a contract has contractual force only if there is objectively ascertainable evidence that it was made with that intention: see generally Edwin Peel *Treitel on the Law of Contract* (13th ed, Sweet & Maxwell Ltd, London, 2011) at [9-045]–[9-049]. Without such evidence the representee may have a claim for damages in tort (see, for example, *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA)) but has no right to performance of the representation. By s 6 the representation is treated "as if" it were a term, seemingly irrespective of, and possibly contrary to, party intention.

genuine intention to expend the damages to protect the performance interest. However, they could in fact retain the damages and sell the land, which would produce for them a very substantial profit.[17] Alternatively, if they built the dam, the value of the land seemingly would be substantially enhanced, although by how much is not clear. At all events, the point that performance damages need not be expended on carrying out the work in question suggests that the courts should be particularly cautious before awarding them. The danger that the award of such damages may cause serious injustice is illustrated by the result in the *Tabcorp* case.[18] The difference in value of the office premises in question with the old foyer and the new one was AUD34,820, whereas the total cost of restoring the foyer was AUD1.38m. The decision awarding this latter cost dealt with the question of reasonableness in a cursory fashion and ignored the question whether the landlord actually intended to restore the foyer.[19] It seems unlikely in all the circumstances that the landlord would in fact spend the money on restoration,[20] and the amount of the damages appears to have conferred on the landlord a very considerable windfall. It might indeed be seen to smack of an exemplary award, to punish the tenant for a deliberate breach of covenant. But there should be no question of punishing a contract-breaker.[21]

5. *The cause of the purchasers' loss*

The measure of damages in the claim in tort against the Council was not performance based but was represented by the difference between the contract price and the value of the land without the water rights. However, the plaintiffs retained the ability to claim damages for misrepresentation under the contract with the vendors, and had in fact obtained a judgment for a sum exceeding the amount of the loss caused by the Council's negligence. Ought the value of the plaintiffs' contractual rights be taken into account? Once again the Court was split on the issue, three members taking the view that they should not and two that they should. Blanchard J[22] considered that the Council could not say as a matter of law that the plaintiffs had suffered no loss for which it had to pay compensation unless and until the purchasers had received payment from the vendors for an amount at least equal to the diminution in the value of the land. The existence of the purchasers' contractual rights and a judgment for their enforcement was not the equivalent of payment, even though there might be little doubt that payment would be made. It was true that in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*[23] the House of Lords said that it

17 Perhaps a court could require an undertaking from the plaintiff to expend the damages on the work that is said to be needed.

18 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.

19 D Saidov "A Further Step Towards Protecting the Performance Interest" [2009] LMCLQ 295 at 297.

20 I have no knowledge of the Landlord's intentions or actions following the Court's judgment.

21 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 at 353 per Lord Bridge.

22 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [69]–[74].

23 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

was necessary to factor in the value of a lender's claim in debt against a borrower under a personal covenant. But *Nykredit* concerned the date when a cause of action accrued, not the measurement of loss, and his Honour would not apply what was said in that case to a claim for damages. The court should not engage in prospective measurement of damages in cases of the present kind, just as it did not do so where both defendants were tortfeasors. Doing so placed the plaintiff at some risk of under-recovery – the risk that the contract defendant who appeared well able to pay might actually prove unable to meet its contractual obligations.

McGrath J[24] (Anderson J agreeing[25]) also took this view. His Honour pointed out, inter alia, that there was no duty on the purchasers to mitigate their loss arising from the Council's negligence by first suing the vendors for breach of contract by their misrepresentations. Here the LIM resulted in the contract becoming unconditional, and it thereby caused the loss along with the vendors' misrepresentation. The purchasers would not have confirmed the contract if the LIM had been correctly supplied. On ordinary principles of causation the Council's negligence was an operative cause of the loss.

Elias CJ and Tipping J dissented on this point. Tipping J[26] drew upon conventional causation principles, but concluded, contrary to the majority view, that the Council's misstatement did not cause loss to the plaintiffs. The LIM contributed to inducing the purchasers to enter the contract, and the essential question was what, if any, loss the plaintiff suffered from entering it. It would be artificial and contrary to authority to focus solely on the state of affairs when the contract was settled. The real issue was whether the contract was ultimately a loss-making one for the purchasers. It was only to the extent that the purchasers were left with a shortfall in their claim for breach of contract that it could be said that the Council's negligence had caused them loss by inducing entry into the contract. If a purchaser first sued a vendor and actually recovered the full measure of its loss, that purchaser could not then commence further proceedings against the council. It would have no remaining loss to recover. The position could not logically be different when the purchaser sued the vendor and the council concurrently and the purchaser's claim against the vendor resulted in full recovery. This view was supported by *Nykredit*, where Lord Nicholls said that if a negligent valuation which had induced a lender to lend on a deficient security had "in practice" caused no damage, there was no cause of action against the valuer. This signalled that the overall outcome of the transaction between contracting parties had to be assessed before the negligence of a third party could be said to have caused loss to one of the contracting parties. In substance their Lordships held that the contractual position needed to be fully worked through before it could be said that the valuer's negligence had caused any loss to the lender. It needed to be

24 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [196]–[209].

25 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [235].

26 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [99]–[123].

shown that the actual value of the security together with the actual value of the borrower's personal covenant were less than the amount owing to the lender.

Tipping J recognised that, in circumstances like the instant case, there was no reason why a plaintiff could not bring claims against both the contract-breaker and the tortfeasor at the same time and in the same proceeding. When A entered into the contract it immediately acquired, at least prima facie, something worth less than the contract entitled it to receive. The damage A thereby suffered was capable of being reduced or eliminated by A's right to claim damages for breach, but that did not mean that no cause of action arose at the outset. A could recover damages for breach of contract from the vendors and any ultimate shortfall in what the vendors were liable to pay, but only within the tortious measure. Sometimes it might be necessary to estimate the likely recovery from the contract-breaker in order to determine what, if any, loss had been caused by the tortfeasor. But here there had not been any question about the ability of the vendors to satisfy the amount of the judgment against them. They had the benefit of indemnities from their real estate agency and their solicitors. So the Council's negligence caused no loss.

Elias CJ thought similarly.[27] Her view, in essence, was that detriment through inducement of a contract of sale was diminished by value obtained by the purchasers in exchange for the price paid. It was the ultimate net position of the purchasers that established their loss. All gains or advantages obtained through the transaction had to be brought into account to offset the loss.

On this issue the majority view seems the better one. All agreed that on the date when A entered the contract a cause of action against the Council accrued in favour of A. The difference of opinion between their Honours was in whether the existence of A's contractual rights against the vendor was relevant in determining whether the Council's negligence caused loss. The minority argument, bringing this factor into account, may be criticised on the basis that it conflates the question of the cause of loss with the question whether or how a loss has been satisfied. Tipping J said that a purchaser who sued a vendor and recovered full damages could not then commence further proceedings against a defendant in the position of the Council. But this does not mean that the Council has not caused loss. On the contrary, it has caused loss but that loss has been fully satisfied by another. Satisfaction of a loss is an independent basis for barring proceedings against anyone else. Suppose now that the purchaser recovers only part of the loss from the vendor, or none of it. Clearly the Council has caused loss in such a case and has to pay the shortfall or the full amount of its liability. It is difficult to see how the cause of a loss can be seen to vary according to the likelihood of recovery against another. Rather, the negligence of the Council is a cause from the moment a cause of action accrues to the purchaser, and the Council remains liable to pay unless and until the loss is fully satisfied in some other way. This, of course, is the position where two or more tortfeasors cause an indivisible loss, and there is no compelling reason not to apply the same principle where one of the defendants is a contract-breaker. Suppose also that a purchaser sues the council and recovers damages and then brings proceedings against a vendor. The damages

27 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [46]–[56].

already awarded would need to be brought into account as representing a partial satisfaction of the purchaser's loss.

6. *Contribution in equity*

We recognised at the beginning of this discussion that there is a right to make a claim for contribution pursuant to the terms of s 17(1)(c) of the Law Reform Act 1936 only in circumstances involving two tortfeasors who are liable to the plaintiff in respect of the same damage. In *Altimarloch* the vendors of the land were liable to the purchasers in contract under s 6 of the Contractual Remedies Act 1979 on account of the misrepresentations by their agents concerning the extent of the water rights. So the vendors were contract-breakers. They were not tortfeasors liable in respect of the same damage as other liable tortfeasors, and accordingly they could not claim contribution under s 17(1)(c).[28] So could the principles of equity fill this gap? The Supreme Court decided, once again in a majority decision, that they could not. Yet this result depends very much on the particular circumstances of the case and the views of the five justices about the various issues in contention. *Altimarloch* is not an impassable obstacle in the way of developing a jurisdiction in equity which might widen the availability of a right to contribution. Indeed it points the way towards resolving at least some of the problems associated with the Law Reform Act.[29]

Four members of the Court agreed that the test to apply in deciding whether an order for contribution could be made was whether the liabilities were "of the same nature and extent",[30] but they could not agree on what this required. Tipping J took a strict view.[31] His Honour said that equity would order a contribution when two parties were under a coordinate liability – a liability of the same nature and extent – to make good one loss, and one paid more than his or her proportionate share of that loss. In such circumstances the overpaying party could recover equalising contribution from the other party or parties. Because their liability was coordinate it was appropriate in equity for the liability to be shared. In the present case the liabilities of the parties were distinctly dissimilar. The liability of the vendors was in contract and that of the Council was in tort. The amounts for which each was liable were by no means the same. There was no one loss. No case had ever applied the equitable doctrine to the extent necessary to cover this degree of dissimilarity.

Tipping J cited leading decisions as supporting this view. In *Burke v LFOT Pty Ltd*[32] Gaudron ACJ and Hayne J said that the notion of coordinate liability depended on "common interest and common burden", and also referred to

28 They would have been tortfeasors but for s 6, which has created this difficulty for contribution claims.

29 See generally B Prewett "Wrongdoers' Rights to Contribution in Mixed Liability Cases" [2012] NZ L Rev 643 for a helpful discussion of the issues.

30 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [75] per Blanchard J, at [129] per Tipping J, at [224] per McGrath J, at [235] per Anderson J.

31 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [124]–[152].

32 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282.

paying more than a proper share to discharge a common obligation. McHugh J confirmed that in determining whether there was a common obligation, the traditional test was whether the liability of each party was "of the same nature and to the same extent". And in relation to *Burke* itself he described the obligations in issue (under the Trade Practices Act 1974 (Cth) and in negligence) as independent, not common. The leading case in England (under the Civil Liability (Contribution) Act 1978 (UK)) was *Royal Brompton Hospital NHS Trust v Hammond*.[33] Lord Bingham noted that the liability to contribute "in respect of the same damage" emphasised the need for the one loss to be apportioned among those liable and that there was a clear difference between a common liability and an independent liability. Lord Steyn said that the notion of a common liability, and of sharing that common liability, lay at the root of the principle of contribution. The legislative context did not justify an expansive interpretation of "the same damage" so as to mean substantially or materially similar damage. Lord Hope thought similarly.

Tipping J considered that in the instant case the liabilities were clearly independent because the causes of action were different (although his Honour accepted that this did not necessarily bar a claim) and the loss was not the same. There was no coordinate liability for the same loss, no single claim for which both parties were liable. Unless the courts were substantially to extend the principles of equitable contribution, the vendors could not obtain contribution from the Council. His Honour did not go on to consider whether the courts should undertake the necessary extension, because a further point would make it inappropriate to make an order even if, as a matter of law, it were possible to do so. If the Council was ordered to contribute to the amount payable by the vendors to the purchasers, the vendors would end up in receipt of more than the property, with its limited water rights, was truly worth. And there was no basis upon which the Council could be required to contribute to the amount paid by the vendors to the purchasers above the tortious measure, because the Council's liability was tortious rather than contractual.

Blanchard J agreed with Tipping J.[34] His Honour considered that a tortfeasor was not liable to contribute to a loss of a character for which it could have no liability to the plaintiff. First, the amount which the vendors had been ordered to pay to the purchasers was entirely measured on a performance basis. The only loss for which the Council was responsible to the purchasers – diminution in value – was not of the same nature and extent as the contractually-measured loss. There was no common obligation or liability. Second, by seeking contribution from the Council on a diminution in value basis, the vendors would be seeking to have the Council refund to them an overpayment by the purchasers which they had been obliged to refund. So the vendors would have received more than the actual value of the land and would be restoring to the purchasers an amount they should not have received. On that measure there was no loss to the vendors for which the Council should be made liable.

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33 *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 (HL).

34 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [75]–[76].

McGrath J[35] was prepared to take a more flexible approach. His Honour noted that the judges of the High Court in *Burke* differed on the scope of what constituted coordinate responsibilities for the purposes of contribution. McHugh J thought that there should be at least an involvement of the parties in a common design to achieve a common end, which narrowed the class of claims for which contribution was available. Callinan J thought similarly. But Gaudron ACJ and Hayne J did not include the limitation. They emphasised the requirement that liability should be of the same nature and extent, including the notions of culpability and causal significance. Kirby J took a wide view. He considered that the test for coordinate liabilities was whether "the liabilities of the co-obligors to the principal claimant were such that enforcement by [the claimant] against either co-obligor would diminish that obligor in his material substance to the value of the liability".

Applying the "same nature and extent" test, his Honour said that equity eschewed too technical an approach and that liability need not be predicated on the nature of the cause of action. It was now recognised that the test concerned the parties' liability for the same *damage*. Here the parties made the same error in their representations which, in each case, induced the purchasers to enter the contract under a mistaken belief about the water rights. Each was an operative cause of the inducement. Neither party was misled by the other. Had either correctly stated the position, the error by the other would not have had the inducing effect. No question of differing degrees of culpability arose. The reality was that both the Council and the vendors made the same error, with the same result that caused the purchasers loss of the same nature.

More difficult was the question whether the loss was of the same extent. The loss could be measured on a difference in value basis or on a reliance basis fixed by the cost of performance. The purchasers did not have an absolute entitlement to the latter, nor was it clear that damages would be so based. If detriment damages had been awarded, there would have been no obvious reason for the Council to demand that the purchasers first resort to the vendors for compensation. The Court's decision on the matter would be a very narrow basis for determining whether the loss was of the same extent.

McGrath J recognised that the Council's contribution should be confined to one based on its liability, so that it was liable to contribute a share of the loss borne by the vendors in proportion to its contribution. This did not result in the vendors being "overpaid". They would not receive any "profit" from the sale, even with contribution. The sum the Council had to pay should not be treated as being a supplement to the purchase price, a reimbursement of difference in value damages, or any other form of inequitable benefit. Rather, it was ensuring that all wrongdoers were held to account for their actions without relief from the exercise of their own causative power. Equity should seek to do justice without being defeated by too technical an approach. This was not a case like *Burke* where the negligent party had been misled by the vendors. Both parties had a causative effect and both should contribute.

Anderson J agreed with McGrath J on this question. So two members of the Court favoured rejecting the claim for contribution, and two favoured allowing

35 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [210]–[231].

it. Elias CJ did not decide the question, but had sympathy for the wider view.[36] Her Honour accepted that equitable contribution was available where liabilities were in substance coordinate although the legal basis of the claim differed. But, as explained above, she considered that the liability for damages of the Council was dependent on the net position reached on the liability of the vendors for breach of contract, so there was no occasion for contribution between them. Indeed, in circumstances where the vendors' representation was treated by statute as though a term of the contract (by s 6 of the Contractual Remedies Act 1979) it did not accord with the principles upon which contribution was ordered that the vendors should be able to spread the liability while retaining the benefit of overpayment. However, her Honour was reluctant to think that a just distribution of responsibility in a case where two or more parties were liable to the plaintiff in respect of damage, which was in substance the same, could not be achieved outside the application of the Law Reform Act 1936. Outside the application of s 6 of the Contractual Remedies Act 1979 there was, she thought, force in McGrath J's approach, and she would want to consider further whether the liability of each defendant was properly to be seen as coordinate or of the same nature, justifying contribution.

The result in *Altimarloch* was that the claim for contribution was rejected. But the Supreme Court's decision nonetheless tends to support a flexible approach to the question whether a coordinate liability for the same loss can be found to exist, although further development of the principles to be applied is needed. There is certainly majority support for the proposition that the relevant causes of action need not be the same, the more controversial question being whether the damage was the same. Both Tipping J and Blanchard J emphasised the difference between damages based on diminution in value and damages based on cost of performance, pointing out that the Council could not be liable on the latter basis. However, the existence of a right to contribution should not depend on the basis upon which the plaintiff made his or her claim or, where both are asserted, on the court's determination on which should be awarded. If damages had been based on difference in value this objection would have disappeared. An order for contribution ought to be possible to the extent of the potential liability to the plaintiff of the defendant from whom contribution is sought. So perhaps the "overpayment" argument is the more substantial.

On the view of Elias CJ and Tipping J concerning the cause of the harm, the Council could not be liable to the purchasers and, accordingly, no order for contribution could be made. But on the finding of the majority (Blanchard, McGrath and Anderson JJ) that the Council was liable for having caused the loss to the purchasers, should we conclude that it would be an overpayment to the vendors to make the Council contribute? If the purchasers sued only the Council, it is hard to see why their claim should not succeed. Surely there is a loss in such a case, irrespective of whether the purchasers would, if sued, be able to satisfy any judgment against them. Seemingly, then, the reason why, on the view of a different majority (Elias CJ, Tipping and Blanchard JJ), the claim for contribution still ought to fail was that the vendors ought not to get it rather than that the Council ought not to pay it. This view focuses on the fact that the

36 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57]–[58].

vendors would be unjustly enriched or, as their Honours preferred to put it, overpaid. Yet it might equally be argued that the Council has been unjustly enriched by the vendors being required to discharge its liability.[37] If the Council had been sued alone it would have been held liable. So the overpayment argument cuts both ways, and the preferable approach is that of McGrath J, who focuses on accountability. Furthermore, and significantly, the majority view does not in any event amount to a substantial restriction on the scope of a claim for contribution in equity. Where there is no risk of overpayment of the vendors, the availability of such a claim remains; and here, in accordance with the views of a third majority (Elias CJ, McGrath and Anderson JJ), a broad, non-technical approach is, or at least may be, justified. Indeed, even Tipping J did not rule out the courts considering an extension of the relevant principles of equity as he saw them in cases where the overpayment argument did not arise.

7. *Impact of Altimarloch*

The Supreme Court's decision in *Altimarloch* was delivered in early 2012, and already there are a number of cases considering its implications in relation to the various matters in issue.[38] As regards contribution in equity, some applications are straightforward.[39] However, express contractual provision can oust any right to contribution that might otherwise arise.[40] In *Pernod Ricard New Zealand Ltd v Lion – Beer, Spirits & Wine (NZ) Ltd*[41] Allan J declined to order the purchaser of wine brands, vineyards, plant and equipment to make a contribution towards the excise duty payable by the vendor on the finished goods sold pursuant to the agreement. His Honour considered that resort to contribution principles was inapt. The transaction was the subject of a number of very detailed contractual documents in which the parties carefully set out their respective rights and obligations. If the vendor was able to make out a case for relief on orthodox contractual principles (as it had) then it had no need for equitable relief. Had it failed on that argument (ie that there was an implied term in the contract that the purchaser would pay the duty), it would not have been right nevertheless to grant relief based upon contribution principles, because to do that would be, in effect, to rewrite the contract between the parties.

The impact of *Altimarloch* in mixed liability cases not surprisingly is more controversial. In *Coutts v Davenports Harbour Lawyers*,[42] Associate Judge Sargisson was satisfied that (as the law presently stood) a claim for

37 See *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [112] per Kirby J.

38 As regards the Council's duty of care, see above n 7; as regards the measure of damages, see above n 14.

39 For example, *Selkirk v McIntyre* [2013] NZHC 575, [2013] NZAR 480 (order for contribution between co-trustees).

40 See *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 All ER 470 at 475 [*The Trident Beauty*].

41 *Pernod Ricard New Zealand Ltd v Lion – Beer, Spirits & Wine (NZ) Ltd* [2012] NZHC 2801 at [247]–[268].

42 *Coutts v Davenports Harbour Lawyers* [2012] NZHC 862 at [45].

contribution which failed under s 17 of the Law Reform Act 1936 could not succeed in equity. In this case a homestead owned by a family trust was burned down in the course of its renovation by builders. The insurer of the homestead declined an insurance claim made by the trustees on the basis that the policy contained an exclusion clause for construction works. The trustees (P) thereupon brought proceedings in contract and tort against its solicitors (D1), alleging that they were in breach of their professional obligations by neglecting to ensure that there was adequate insurance in place to cover the risks of construction. D1 issued third party notices against the builders (D2), claiming that they were responsible for the fire and that it was entitled to a contribution pursuant to s 17(1)(c) of the Law Reform Act 1936 or on the application of the relevant principles of equity. P applied to have the third party notices set aside, and although the Judge had a degree of sympathy for D1 he acceded to the application.

As regards s 17, Associate Judge Sargisson recognised that there could be an order for contribution only where D1 and D2 were liable in respect of the "same damage". She noted that in the *Royal Brompton* case[43] Lord Steyn rejected the wide test of mutual discharge and an expansive interpretation of these words, and asked instead whether there had been a sharing of a common liability. Her Honour thought also that it had to be inferred that in *Altimarloch* the Supreme Court approved of the narrow approach in s 17 cases. She accepted that the members of the Court did not speak with one voice on the issue, but pointed out that both Elias CJ and Tipping J (with whom Blanchard J agreed) applied aspects of the *Royal Brompton* decision, that a number of extracts from Tipping J's judgment emphasised that "same damage" referred to a common liability as opposed to an independent liability, and that even McGrath J in his dissenting judgment referred to *Royal Brompton* with approval. In the instant case her Honour was satisfied, upon an acute evaluation and comparison of the claims, that D1 and D2 were not liable in respect of the same damage. The damage caused by the negligence of D2 was the destruction of the homestead by fire. The damage caused by the negligence of D1 was the inability to claim insurance. D1 and D2 did not share responsibility for either instance of negligence.

Turning to the question of contribution in equity, her Honour considered similarly that no claim could be made. P's claim against D1 included causes of action for negligence and for breach of contract. *Altimarloch* determined that the liabilities of the parties between whom equitable contribution could be ordered should be "of the same nature and extent", and Tipping J confirmed that this required that all parties were under a coordinate liability for the same loss. It could not be said that equity widened the scope of the test upon which an order for contribution would be deemed appropriate. Here D1's liability was in contract and tort for failing to ensure that the property was adequately insured, and D2's liability was in tort for action or inaction that caused the destruction by fire. Although each party might be liable, the nature and the extent of each liability were distinct. There was no single claim for which both were liable. The liabilities were independent and the resultant damage or loss was not the "same".

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43 *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 (HL).

Section 17 of the Law Reform Act 1936 and the impact of *Altimarloch* were considered once again by Winkelmann J in *Financial Markets Authority v Hotchin*.[44] In that case the Financial Markets Authority (FMA) alleged that the first defendant (D1) and the other directors of three companies had authorised the distribution of misleading company prospectuses, and sought compensation for the subscribers under s 55G of the Securities Act 1978. D1 argued that the trustees of the companies' trust deeds (D2) were liable to contribute to any compensation he was ordered to pay to the FMA and joined them as third parties to the proceedings. The trustees applied to strike out the claims against them. Winkelmann J held that the fact that the FMA had brought the claim on behalf of depositors ought not to exclude rights of contribution[45] and that there was a tenable argument that the trustees owed duties to take care to use their powers to protect prospective investors.[46] The question then became whether any tenable claims against the trustees were for the same damage. Her Honour maintained, drawing upon the *Royal Brompton* case, that the expression "the same damage" referred not to quantum of loss, or damages, but rather to the harm suffered by the depositors for which they were entitled to compensation. If it could be established that the trustees failed in their duty to monitor the affairs of the company for insolvency or breaches of the trust deeds, the damage resulting would be the losses incurred by the depositors while the trustees wrongfully failed to act. If it could be established that the directors made untrue statements, the damage resulting would be that the depositors invested in a company in reliance on untrue statements. These were different losses. Even if the trustees ought to have "pulled the plug" earlier, the trustees could not be liable for the loss independently caused by directors. The focus was on whether the liability was of "the same nature and to the same extent", using the language adopted in the *Burke* case in Australia.

Winkelmann J also was satisfied that the same principles underlay the law of equitable contribution, as seen in the *Altimarloch* decision. The common thread of the judgments in that case was that equitable contribution was available when the parties' liability was of the same nature and extent. The fact that any loss recovered from one person would tend to reduce the loss recoverable from another was not a valid indicia of coordinate liability. The parties did not share such liability and the case should be struck out on this ground.

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44 *Financial Markets Authority v Hotchin* [2013] NZHC 1611.

45 *Financial Markets Authority v Hotchin* [2013] NZHC 1611 at [23]. Her Honour considered that any other view would produce capricious results. If the depositors themselves brought a claim against the directors at common law or under s 55G of the Securities Act 1978, rights of contribution would be available to the directors, but these would be lost if, on the trustees' case, the FMA stepped in and brought a claim on the depositors' behalf.

46 *Financial Markets Authority v Hotchin* [2013] NZHC 1611 at [41]–[48]. Her Honour was satisfied that the trustees could arguably owe duties both under the trust deed and in tort, because the indications in the trust deeds that the trustees' duties were owed to existing depositors were not decisive; the Act did not state to whom a trustee's duty (specified in the regulations and deemed to be incorporated into the deeds) was owed, and there was nothing in the Act or regulations which was inconsistent with the extension of that duty to prospective depositors.

A further argument was that a person could not claim contribution from another either under the Law Reform Act 1936 or in equity if obliged to indemnify that other in respect of the damage in respect of which contribution was sought; and here, it was argued, the directors were obliged to indemnify the trustees. However, her Honour decided that any right to indemnity was not so clear cut that it justified striking out the claim. A negligent misstatement claim based on the directors' certification to the trustees that the statements in the prospectuses were true and accurate would likely raise issues not inevitably resolved against the first defendant in the context of the FMA claim. The certificates spoke to only one particular point in time whereas statements in prospectuses continued to speak during the offer period. It might be that the opinions were not negligently expressed as at the date of the certificate but that the situation deteriorated thereafter. And there needed to be proof of reliance by the trustees, which issue might not be straightforward in circumstances where the trustee was also receiving information, reports and certificates from the auditors.

8. *Conclusions*

We have seen that the question whether coordinate liabilities are of the same nature and extent has given rise to significant differences of opinion, both in *Altimarloch* itself and in the leading overseas decisions. In this light we certainly can accept that Associate Judge Sargisson in the *Coutts* case[47] and Winkelmann J in the *Financial Markets Authority* decision[48] were correct in concluding that *Altimarloch* has not expanded the relevant principles of law concerning the availability of a right to contribution in equity. But the decision arguably does not bar any such expansion, and perhaps the opportunity for further development of the law remains. As we have seen, their Honours took different views about the circumstances in which two or more liabilities could be seen as being of the same nature and extent, yet McGrath J, with the agreement of Anderson J and the support of Elias CJ, eschewed a narrow understanding of this test. McGrath J's focus was simply on whether the damage was the same, and this approach points to the way forward.

Let us consider the matter from the standpoint of a plaintiff bringing two or more claims rather than a defendant bringing a claim for contribution against another potential defendant. A significant reason why we may need to know whether the conduct of both A and B has caused a plaintiff (P) to suffer the same damage is found in the rule that P cannot recover more than his or her actual loss. If P sues A and recovers damages and then brings a second action against B, fairly clearly B is entitled to bring into account the damages already paid to P by A to the extent that they cover the same loss claimed against B.[49]

47 *Coutts v Davenports Harbour Lawyers* [2012] NZHC 862.

48 *Financial Markets Authority v Hotchin* [2013] NZHC 1611.

49 It is possible that the rule in *Henderson v Henderson* (1843) 6 Hare 100 could come into play. This allows the court to strike out a claim which properly belonged to earlier litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The principle is founded on the public policy aimed at preventing a multiplicity of actions: *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 (PC) at 425. See generally Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [26.2].

As we noted at the outset, full satisfaction of P's claim against A bars further proceedings against A, and similarly it bars proceedings against any joint or concurrent wrongdoers. The reason, explained by Tipping J in *Allison v KPMG Peat Marwick*,[50] is simply that the plaintiff's loss no longer exists: there is nothing left for anyone to sue on. And even if there has been no full satisfaction, it follows that partial satisfaction must be a partial bar.[51]

The availability of a claim for contribution as between defendants seemingly should operate on the same basis as the availability of a claim as between plaintiff and defendant that the whole or a part of a loss has been satisfied. After all, P is free to sue such defendant or defendants as he or she chooses. So if a claim by P against A results in P being awarded $X, and a subsequent claim against B can be defended on the basis that P's claim has already been satisfied by the payment of $X by A, then surely A should be able to claim a contribution from B. Perhaps, then, the courts could develop a test which asks whether payment by A discharges, in whole or part, any obligation to pay owed by B. No doubt the resolution of the question sometimes could involve calculations of considerable complexity, but that does not mean that it would be incapable of judicial determination. Applying the test would involve determining the full extent of the damage caused by A and by B and then an assessment of the extent to which the damage in each case overlaps. Contribution principles could be applied to the overlapping part. This approach might indeed be recognised as a natural consequence of the rule that a plaintiff cannot recover damages in respect of a loss that has been satisfied by another.

What matters, then, is whether the damage overlaps, not whether the liability of A and B is common as opposed to independent. Indeed, it is hard to see what exactly is achieved by an insistence on there being liabilities "of the same nature and extent" beyond formal adherence to a requirement laid down in certain existing decisions that is highly uncertain in its application. Furthermore, a test which asks instead whether a payment discharges another's liability would determine only whether, in principle, an award of contribution could be made. It would not determine the size of any award. If a claim were held to be available, the court would need to exercise its discretion in determining whether an award ought to be made at all or in deciding the amount that ought to be awarded. By s 17(2) of the Law Reform Act 1936, the amount of any award of contribution recoverable from any person "shall be

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50 *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA) at 587, 589.

51 Compare the situation where P1 brings a claim against A and recovers damages and then P2 brings a second claim against A in respect of the same wrongdoing. This may happen where P1 recovers damages from A in respect of a defect in a building and sells to P2 without having repaired the building and without having disclosed the defect to P2. In this case any claim by P2 is not barred by A having satisfied the judgment in favour of P1. In *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [72] [*Sunset Terraces*], Tipping J said that the duty owed to a first owner is not transferred to the second owner on sale and nor is the loss. The duty is owed independently to the second owner, and the second owner should be able to recover loss suffered as a result of a breach of a duty owed to him, quite independently of the first owner's position. Probably, however, P2's claim would be treated as having been wholly caused by P1's deceit: see Stephen Todd "Leaky Buildings: Limitation Issues and Successive Owners" in *The Leaky Buildings Crisis* (Brookers, Wellington, 2011) at 123–138.

such as may be found by the Court to be just and equitable, having regard to the extent of that person's responsibility for the damage". Certainly a claim for contribution in equity would need to be determined on a similar basis.

In summary, the differing views about the circumstances in which two or more liabilities can be recognised as being of the same nature and extent suggests that it would be desirable to abandon the use of this test and to search for another, both in the interest of certainty in the law and in an attempt to articulate the core principle that ought to be applied in contribution cases. There is indeed a powerful case to be made in favour of the view taken by Kirby J in *Burke*,[52] that the test should be, quite simply, whether enforcement against one wrongdoer will diminish the liability of the other. This very arguably would best give effect to the general principles of justice underlying contribution claims.[53] These are founded ultimately on the principle that the wrongdoer whose liability is diminished has been unjustly enriched at the expense of the paying wrongdoer. In *Ronex Properties Ltd v John Laing Construction Ltd*[54] Sir Sebag Shaw said, in relation to the statutory right of contribution between tortfeasors, that it resembled a claim by a plaintiff for money paid by him to the use of the defendant, who had been relieved, pro tanto, of his direct liability to the victim of the tort. There is indeed a clear analogy with unjust enrichment cases demonstrating a claimant's right to reimbursement following his or her compulsory payment of another's debt.[55] More generally, unjust enrichment at another party's expense is an event to which the law responds by giving that party, in defined circumstances, a right to restitution of that enrichment. Recognising a right to contribution for the benefit of a party whose payment of damages has discharged another's liability, in whole or part, would be a natural and fitting development.

In light of what was decided in *Altimarloch*, it is uncertain whether the courts will now take further steps towards achieving this result. While not impossible, it would indeed be a notable feat of judicial creativity. It would depend also on the right case being litigated and, probably, being taken to the Supreme Court. Yet the question whether a claim for contribution ought to be available in mixed liability cases can frequently arise, and the consequences of the answer can be very significant. Perhaps, should the matter return to the Supreme Court, an answer giving effect to McGrath J's wider view (but without the complication requiring that there be liabilities "of the same nature

52 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282.

53 See *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 (HCA) at 350 and *Mahoney v McManus* (1981) 180 CLR 370 (HCA) at 378, referring to the "natural justice" of contribution claims; and see further, B Prewett "Wrongdoers' Rights to Contribution in Mixed Liability Cases" [2012] NZ L Rev 643.

54 *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 (CA) at 407.

55 See C Mitchell, P Mitchell and S Watterson *Goff and Jones on the Law of Unjust Enrichment* (11th ed, Sweet & Maxwell Ltd, London, 2011) at [19-16]–[19-21].

and extent") would be given.[56] Otherwise we may have to rely, experience suggests forlornly, on the hope of legislation.[57]

56 It may be significant that Blanchard and Tipping JJ, the two members of the Court who favoured a narrower approach, have both retired.

57 For proposals made in 1998 and a draft Act, see Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998); and see also Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012).